

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

D.W.,¹

Plaintiff,

v.

LELAND DUDECK, Acting Commissioner
of Social Security,²

Defendant.

Case No. [23-cv-06189-PHK](#)

ORDER REMANDING CASE

Plaintiff D.W. (“Plaintiff”) brings this action under the Social Security Act, 42 U.S.C. § 405(g) (“the Act”), seeking judicial review of a final decision by the Acting Commissioner of the Social Security Administration, Defendant Leland Dudeck (“Commissioner”), denying his applications for disability insurance benefits and supplemental security income. [Dkt. 1]. The Parties have consented to proceed before a Magistrate Judge for all purposes, including the entry of final judgment, under 28 U.S.C. § 636(c). [Dkt. 6; Dkt. 7]. Plaintiff has filed an Opening Brief, the Commissioner has filed a Response Brief, and Plaintiff has filed a Reply Brief. [Dkt. 16; Dkt. 18; Dkt. 20]. The Commissioner has also filed the Administrative Record. [Dkt. 8; Dkt. 13].

¹ In actions involving requested review of a decision by the Commissioner of the Social Security Administration, the Court generally uses the first name and initial of last name (or just both initials) of the Plaintiff in the Court’s public orders out of an abundance of caution and regard for the Plaintiff’s potential privacy concerns.

² This lawsuit was initially filed against Kilolo Kijakazi, who was then the Acting Commissioner of the Social Security Administration. *See* Dkt. 1. Pursuant to Federal Rule of Civil Procedure 25(d), Leland Dudeck, who is the current Acting Commissioner of the Social Security Administration as of the date of this Order, is “automatically substituted” as Defendant.

After carefully analyzing the briefs, the record, and the applicable law, the Court **REVERSES** the Commissioner’s final decision and **REMANDS** for further proceedings consistent with this Order.

BACKGROUND

The following background focuses only on the factual matters and procedural history that are relevant to the Court’s analysis herein.

Plaintiff was born on December 23, 1965; he was thirty-eight years old on the alleged disability onset date. [AR 87]. He speaks English and has a high school diploma. [AR 587-88]. His employment history includes positions as a construction worker, a delivery driver, a cook, and a warehouse worker. [AR 92-93, 567-78].

On September 27, 2010, Plaintiff filed an application for a period of disability and disability insurance benefits, pursuant to Title II of the Act, as well as an application for supplemental security income, pursuant to Title XVI of the Act. [AR 507-21]. In his applications, Plaintiff alleged that he had been unable to work, since June 30, 2004, due to “major back problems 2 two [sic] rods in back, right eye[.]” [AR 87]. Plaintiff later supplemented his applications to allege that he was unable to work, since December 2010, due to worsening headaches. [AR 88]. The Commissioner denied Plaintiff’s applications, initially on April 29, 2011, and upon reconsideration on September 23, 2011. [AR 12].

Plaintiff then successfully requested a hearing before an Administrative Law Judge (“ALJ”). Hearings took place on March 8, 2012 and October 2, 2012 before ALJ Richard Laverdure. [AR 36-64]. Plaintiff appeared and testified at both hearings, *pro se* at the March 8, 2012 hearing, and then represented by counsel at the October 2, 2012 hearing. *Id.* At the October 2, 2012 hearing, the ALJ also heard testimony from a Vocational Expert. [AR 41-46].

On November 19, 2012, the ALJ issued a written decision denying Plaintiff’s applications, and on January 28, 2024, the Appeals Council denied Plaintiff’s request for review of the ALJ’s decision. [AR 71-84].

Subsequently, the Parties stipulated—pursuant to the terms of a class action settlement agreement reached in *Hart v. Colvin*, No. 4:15-cv-00623-JST (N.D. Cal.)—that the

1 Commissioner's decision be reversed and remanded for further administrative proceedings. *See*
2 AR 12. The purpose of these further administrative proceedings was to determine whether
3 Plaintiff was disabled within the meaning of the Act during the period from the alleged onset date,
4 June 30, 2004, up to the prior date of adjudication, November 19, 2012. In accordance with the
5 terms of the *Hart* settlement agreement, the consultative examination report prepared by Frank
6 Chen, M.D., was excluded from the record.

7 Hearings were then held on September 30, 2021 and December 7, 2022 before ALJ E.
8 Alis. [AR 1125-82]. Plaintiff appeared and testified at both hearings, accompanied by a non-
9 attorney representative. *Id.* The ALJ also heard testimony at the September 30, 2021 hearing
10 from a Vocational Expert. [AR 1175-82]. Medical opinions were provided by an examining
11 internal medicine physician, Dr. Rose Lewis; an examining physical medicine and rehabilitation
12 specialist, Dr. Calvin Pon; and a non-examining state agency physician, Dr. M.L. Rees. [AR 887-
13 94, 900-02, 1115-24].

14 At the September 30, 2021 and December 7, 2022 hearings, Plaintiff testified that he
15 suffered from chronic, progressively worsening back pain stemming from a 1998 work-related
16 injury. [AR 1132, 1159, 1162]. Plaintiff testified that he underwent spinal fusion surgery, but he
17 denied that the procedure resulted in any improvement to his condition. [AR 1164-65]. Plaintiff
18 testified that he experienced pain every day, describing the pain's severity as "[a]bout a seven,
19 eight" out of ten. [AR 1138]. He testified that the pain shot from his neck down bilaterally to his
20 feet. [AR 1157]. He testified that he experienced constant numbness in his lower back. [AR
21 1168]. Plaintiff testified that, due to the pain, he was able to sit or stand continuously for no more
22 than fifteen to twenty minutes at a time. [AR 1133]. He testified that, on a good day, he was able
23 to walk one hundred yards, and, on a bad day, only fifty yards. [AR 1168]. He testified that he
24 had difficulty bending over. [AR 1134].

25 Plaintiff testified that, due to the physical injury from a 2007 bullet wound to his head, he
26 is completely blind in his right eye. [AR 1171]. Plaintiff testified that he lacks peripheral vision
27 and struggles with depth perception and balance. [AR 1135-36]. Plaintiff testified that he also
28 suffers from "excruciating headaches" caused by his visual impairments. [AR 1136, 1171]. He

1 told the ALJ that he experiences these “severe” headaches “all day.” [AR 1171].

2 Plaintiff testified that he has been homeless since around 2006 or 2007. [AR 1166]. He
3 told the ALJ that he has no income aside from government assistance. *Id.* Plaintiff testified that,
4 on a typical day, he does “[n]othing” except “wait[] for the pain to leave.” [AR 1137]. He told
5 the ALJ that he often lays on a park bench or sits against a car “where it’s warm” to alleviate his
6 back pain. [AR 1138, 1167].

7 At the September 30, 2021 hearing, Plaintiff admitted that, from 2016 to 2018, he worked
8 in a warehouse distribution facility as a void filler, package filler, and crate stacker. [AR 1155].
9 Plaintiff testified that he took the job, notwithstanding his physical impairments, because he
10 “needed to survive.” [AR 1157]. Plaintiff testified that he intended to work full-time, but because
11 he “couldn’t stand up for too long on the job” and would often need to “take off early” to rest, he
12 ultimately worked only twenty hours per week. [AR 1158]. Plaintiff testified that he quit the job
13 after sustaining a work-related injury to his shoulder in February 2017. [AR 1156].

14 At the December 7, 2022 hearing, Plaintiff’s non-attorney representative urged the ALJ to
15 review the opinion from consulting physician, Dr. Lewis, regarding her 2022 examination of
16 Plaintiff. The ALJ responded that they would consider the opinion, noting that “given the finding
17 of the consultative examination, it’s possible that [Plaintiff] could be found disabled now.” [AR
18 1139]. However, the ALJ stressed that, pursuant to the terms of the *Hart* settlement agreement,
19 the ALJ’s review was “really going to be limited to the period of time from the alleged onset date
20 to the prior date of adjudication.” *Id.*

21 On January 25, 2023, the ALJ issued a written decision which followed the
22 Commissioner’s five-step, sequential evaluation process for determining the merits of Plaintiff’s
23 applications. [AR 12-20]. The five-step analysis requires the ALJ to consider whether the
24 claimant: (1) has engaged in “substantial gainful activity” during the alleged period of disability;
25 (2) has a medically determinable impairment or combination of such impairments that is “severe;”
26 (3) has a condition that meets or equals the severity of a listed impairment; (4) has the residual
27 functional capacity (“RFC”) to return to their past relevant work; and, if not, (5) can perform other
28 work in the national economy. 20 C.F.R. §§ 404.1520(a)(4), 416.920(a)(4); *Wischmann v.*

1 *Kijakazi*, 68 F.4th 498, 504 & n.3 (9th Cir. 2023).

2 In the January 25, 2023 written decision, the ALJ determined, at step one, that Plaintiff had
3 not engaged in substantial gainful employment during the relevant period, from June 30, 2004
4 through November 19, 2012. [AR 14]. At step two of the analysis, the ALJ found that Plaintiff
5 had the following severe impairments: “right eye blindness; status post gunshot wound; status post
6 lumbar laminectomy, discectomy, and fusion at L5-S1 with hardware placement[.]” [AR 15]. The
7 ALJ also found evidence of “treatment for a thumb fracture in June or July 2008,” but noted that
8 Plaintiff subsequently “reported that it was ‘a case of mistaken identity’ and that he did not receive
9 treatment for a thumb injury.” *Id.* None of Plaintiff’s impairments, alone or in combination, were
10 found to be presumptively disabling at step three. *Id.*

11 Prior to reaching step four, the ALJ assessed Plaintiff’s RFC and found him capable of
12 light work, subject to the following limitations:

13 [H]e can lift or carry 20 pounds occasionally and 10 pounds frequently, stand 6
14 hours in an 8-hour workday, walk 6 hours in an 8-hour workday, and sit 6 hours in
15 an 8-hour workday. He can push or pull as much as he can lift or carry. The
16 claimant cannot work at unprotected heights or around workplace hazards that pose
17 a threat to life or limb. He cannot perform work requiring depth perception. The
claimant requires the ability to alternate between sitting and standing periodically
throughout the workday as needed so long as he is not off task or need [sic] to leave
the workstation while doing so. He cannot climb ladders, ropes, or scaffolds. He
can occasionally climb ramps and stairs, balance, stoop, crouch, kneel, and crawl.

18 [AR 16].

19 In establishing this RFC, the ALJ evaluated Plaintiff’s subjective allegations of his pain
20 and other symptoms, the objective medical evidence, and the medical opinion evidence. [AR 16-
21 18]. The ALJ determined that, while Plaintiff’s medically determinable impairments could
22 reasonably be expected to cause his asserted symptoms, Plaintiff’s testimony regarding the
23 intensity, persistence, and limiting effects of the symptoms was “not entirely consistent” with the
24 overall record “at all times relevant” to the decision. [AR 17]. The ALJ likewise concluded that
25 the overall record, though supportive of some functional limitations, did not support the existence
26 of limitations greater than those set forth in the RFC assessment.

27 In reaching these conclusions, the ALJ evaluated the medical opinion evidence. The ALJ
28 first discussed Dr. Pon’s opinion regarding his February 11, 2009 examination of Plaintiff. [AR

17]; *see* AR 900-02. The ALJ summarized Dr. Pon’s findings and determinations: that Plaintiff could lift and carry twenty pounds occasionally and ten pounds frequently; that he can sit, stand, and/or walk six hours in an eight-hour workday; that he can occasionally stoop, crouch, kneel, squat, climb ladders, and crawl; and that he can frequently climb stairs and perform pushing leg/foot controls. [AR 17]. The ALJ determined that the exertional limitations opined by Dr. Pon were “consistent with the evidence related to the back,” but ultimately accorded the opinion only “partial weight” because Dr. Pon did not include any limitations relating to Plaintiff’s right eye blindness caused by the gunshot wound. *Id.*

The ALJ next discussed Dr. Rees’s opinion. [AR 17-18]; *see* AR 887-94. The ALJ summarized Dr. Rees’ findings and determinations: that Plaintiff “could lift and/or carry 50 pounds occasionally and 25 pounds frequently, stand and/or walk about 6 hours in an 8-hour workday, and sit about 6 hours in an 8-hour workday.” [AR 17-18]. The ALJ gave this opinion “partial weight” as follows:

[Dr. Rees’] limitations are not entirely consistent with the underlying evidence. The progress notes and the consultative examination report show lumbar fusion with ongoing pain symptoms affecting the lower back. Dr. Pon’s examination showed reduced motor and range of motion in the hips secondary to back pain. The impairment reasonably limits the claimant to light exertional work activity with some postural limitations. I am including the ability to alternate between sitting and standing periodically throughout the workday to ensure there is no exacerbation of back pain symptoms. I also disagree with Dr. Rees’ failure to include any specific limitations for vision impairment.

[AR 18].

Next, after noting that the record contained “various limitations/work modifications from workers compensation providers” that were given “little weight” because they did not relate to the relevant time period, the ALJ discussed Dr. Lewis’s opinion regarding her June 14, 2022 examination of Plaintiff. [AR 18]; *see* AR 1115-24. The ALJ found that Dr. Lewis’s opinion—which limited Plaintiff to a range of sedentary activity—provided evidence that Plaintiff’s condition “ha[d] deteriorated.” [AR 18]. However, the ALJ gave Dr. Lewis’s opinion “little weight,” because it was “based on clinical findings well after the relevant period (nearly a decade),” and thus, “not relevant” to whether Plaintiff was disabled during the relevant period. *Id.*

Finally, the ALJ discussed Plaintiff’s own testimony regarding the limiting effects of his

1 conditions. [AR 18]. The ALJ found that Plaintiff's testimony regarding "significantly
2 compromised standing/walking tolerance" was "inconsistent with the progress notes and Dr. Pon's
3 examination, showing little to no strength deficits affecting the lower extremities." *Id.* The ALJ
4 also cited a December 2010 function report, in which Plaintiff admitted to washing "a car or 2"
5 each day. *Id.* (citing AR 796). In addition, the ALJ referenced Plaintiff's testimony from the
6 September 2021 hearing and summarized that testimony as follows:

7 At the September 2021 hearing, the claimant testified he was able to work from
8 2016 to 2018 in a warehouse as a void filler, package filler, and crate stacker. He
9 stopped working due to a shoulder injury sustained after lifting ten crates over his
10 head. He reported no problems walking or standing while working and he was able
to successfully work at a much higher exertional level than that called for in the
[RFC] assessed herein.

11 *Id.*

12 At step four, the ALJ determined, based on the Vocational Expert's testimony, that
13 Plaintiff was unable to perform any past relevant work. [AR 18-19].

14 Prior to reaching step five, the ALJ determined that Plaintiff was "defined as a younger
15 individual age 18-49, on the alleged disability onset date;" that Plaintiff "has at least a high school
16 education;" and that transferability of job skills was "not material" to the disability determination.
17 [AR 19].

18 At step five, the ALJ found that, considering Plaintiff's age, education, work experience,
19 and RFC, "there are jobs that exist in significant numbers in the national economy" that Plaintiff
20 can perform. *Id.* The ALJ determined that Plaintiff would be able to perform such
21 "representative" jobs as a sorter, bagger, or basket filler. [AR 19-20]. For that reason, the ALJ
22 concluded that Plaintiff was not under a "disability," as defined by the Act, and denied Plaintiff's
23 applications for benefits. [AR 20]. That denial prompted Plaintiff's request for judicial review.
24 *See* Dkt. 1; AR-3.

25 **STANDARD OF REVIEW**

26 A district court has the "power to enter, upon the pleadings and transcript of the record, a
27 judgment affirming, modifying, or reversing the decision of the Commissioner of Social Security,
28 with or without remanding the case for a hearing." 42 U.S.C. § 405(g). The Court's review in

such cases is limited to determining: (1) whether substantial evidence supports the Commissioner’s decision; and (2) whether the Commissioner’s decision comports with relevant legal standards. *Stout v. Comm’r, Soc. Sec. Admin.*, 454 F.3d 1050, 1052 (9th Cir. 2006) (“We will uphold the Commissioner’s denial of benefits if the Commissioner applied the correct legal standards and substantial evidence supports the decision.”); *accord Woods v. Kijakazi*, 32 F.4th 785, 788 (9th Cir. 2022); *see generally* 42 U.S.C. § 405(g).

“Substantial evidence” is “more than a mere scintilla”—it is “such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Woods*, 32 F.4th at 788 (quoting *Biestek v. Berryhill*, 587 U.S. 97, 103 (2019)). “Overall, the standard of review is highly deferential.” *Kitchen v. Kijakazi*, 82 F.4th 732, 738 (9th Cir. 2023) (quoting *Rounds v. Comm’r*, 807 F.3d 996, 1002 (9th Cir. 2015)); *see Biestek*, 587 U.S. at 103 (“[W]hatever the meaning of ‘substantial’ in other contexts, the threshold for such evidentiary sufficiency is not high.”). In evaluating whether substantial evidence supports a finding, the Court “must review the administrative record as a whole, weighing both the evidence that supports and the evidence that detracts from the Commissioner’s conclusion.” *Reddick v. Chater*, 157 F.3d 715, 720 (9th Cir. 1998). Any conflict in the evidence is to be resolved by the ALJ, and not the Court. *Smartt v. Kijakazi*, 53 F.4th 489, 494 (9th Cir. 2022) (“Where evidence is susceptible to more than one rational interpretation, the ALJ’s decision must be affirmed.”).

ANALYSIS

As summarized above, the ALJ’s January 25, 2023 written decision under review followed the Commissioner’s five-step, sequential evaluation process for determining the merits of Plaintiff’s applications. [AR 12-20]; *see* 20 C.F.R. §§ 404.1520(a)(4), 416.920(a)(4). It is well-settled that, under this analysis, the claimant has the burden to establish a *prima facie* case of disability at steps one through four. *Triechler v. Comm’r of Soc. Sec. Admin.*, 775 F.3d 1090, 1096 n.1 (9th Cir. 2014) (quoting *Hoopai v. Astrue*, 499 F.3d 1071, 1074-75 (9th Cir. 2007)). The burden then shifts to the Commissioner, at step five, to show that the claimant retains sufficient RFC to perform work in the national economy, given the claimant’s age, education, and work experience. *Id.*

1 A finding that a claimant is “disabled” or “not disabled” at any point in the five-step
2 review is conclusive and terminates the analysis. *Tackett v. Apfel*, 180 F.3d 1094, 1098 (9th Cir.
3 1999) (citing 20 C.F.R. § 404.1520). To be disabling, the claimant’s condition must be so
4 functionally limiting as to preclude any substantial gainful activity for at least twelve consecutive
5 months. 42 U.S.C. §§ 423(d)(1)(A), (2)(A).

6 Plaintiff challenges the ALJ’s decision on several grounds. Plaintiff argues, first, that the
7 ALJ’s RFC determination is not supported by substantial evidence, because the ALJ failed to
8 incorporate or otherwise address any limitations from headaches. [Dkt. 16 at 6-7]. Next, Plaintiff
9 argues that the ALJ’s specific RFC finding—that Plaintiff “requires the ability to alternate
10 between sitting and standing periodically throughout the workday as needed . . . to ensure there is
11 no exacerbation of back pain symptoms”—is “conclusory” and “unsupported” by medical
12 evidence or the overall record. *Id.* at 8. Third, Plaintiff argues that the ALJ improperly evaluated
13 his subjective allegations regarding pain and other limitations. *Id.* at 9-12. Finally, Plaintiff
14 argues that the ALJ erred at step five of the analysis by adopting Vocational Expert testimony that
15 was “unreliable,” and thus, not supported by substantial evidence. *Id.* at 12-18.

16 The Commissioner argues in response that the ALJ properly considered the entire
17 evidentiary record and followed the applicable, controlling law in determining that Plaintiff is not
18 disabled for purposes of the Act. [Dkt. 18 at 6-18].

19 **I. Limitations Due to Headaches**

20 Plaintiff’s first asserted ground for error is that the ALJ’s RFC determination is not
21 supported by substantial evidence, because the ALJ failed to discuss or otherwise analyze the
22 extent to which Plaintiff is limited by headaches. [Dkt. 16 at 6-7].

23 “At step two of the disability analysis, the ALJ must determine whether the claimant has
24 any ‘severe medically determinable’ impairments.” *Ferguson v. O’Malley*, 95 F.4th 1194, 1198
25 (9th Cir. 2024) (quoting 20 C.F.R. § 416.920(a)(4)(ii)). “A ‘severe impairment’ is one that
26 significantly limits a claimant’s ability to perform basic work activities.” *Id.* (quoting 20 C.F.R. §
27 416.920(c)). “[B]asic work activities” are defined as “the abilities and aptitudes necessary to do
28 most jobs,” which include physical functions such as walking, standing, sitting, pushing, and

1 carrying, and mental functions such as understanding and remembering simple instructions,
 2 responding appropriately in a work setting, and dealing with changes in a work setting. 20 C.F.R.
 3 §§ 404.1522(b), 416.922(b). “An impairment is not severe if it is merely ‘a slight abnormality (or
 4 combination of slight abnormalities) that has no more than a minimal effect on the ability to do
 5 basic work activities.’” *Webb v. Barnhart*, 433 F.3d 683, 686 (9th Cir. 2005) (quoting SSR 96-
 6 3(p)). The step-two inquiry is “merely a threshold determination meant to screen out weak
 7 claims.” *Buck v. Berryhill*, 869 F.3d 1040, 1048 (9th Cir. 2017) (citing *Bowen v. Yuckert*, 48 U.S.
 8 137, 146-47 (1987)).

9 Once the ALJ finds that the claimant has at least one severe impairment at step two, the
 10 ALJ must consider all of the claimant’s impairments when formulating the claimant’s RFC at step
 11 four, including those impairments the ALJ determined to be non-severe. *Buck*, 869 F.3d at 1048-
 12 49. An RFC must account for *all* of a claimant’s medically determinable impairments (whether
 13 severe or non-severe) and must reflect the total limiting effects of all such impairments. 20 C.F.R.
 14 §§ 404.1545(e), 416.945(e); *Buck*, 869 F.3d at 1049; *see also* SSR 96-8p, 1996 WL 374184, at *5
 15 (“In assessing RFC, the adjudicator must consider limitations and restrictions imposed by all of an
 16 individual’s impairments, even those that are not ‘severe.’”).

17 While the regulations require the ALJ to *consider* the limiting effects of all impairments
 18 (both severe and non-severe) in assessing the RFC, they do not require the ALJ to translate every
 19 non-severe impairment into a functional limitation in the RFC. *D.L.P. v. Kijakazi*, No. 21-cv-
 20 00792-VKD, 2022 WL 4472064, at *3 (N.D. Cal. Sept. 26, 2024) (citations omitted). “Provided
 21 the ALJ does not rely on boilerplate language, but actually reviews the record and specifies
 22 reasons supported by substantial evidence for not including the non-severe impairment, the ALJ
 23 has not committed legal error.” *Id.* (citation omitted).

24 In the written decision, the ALJ determined, at step two, that Plaintiff has severe
 25 impairments, including right eye blindness and back impairment. [AR 15]. The ALJ then
 26 determined that Plaintiff was able to perform light work (subject to certain limitations), and that he
 27 was capable of performing jobs such as a sorter, bagger, or basket filler. [AR 16-20].

28 In reaching these conclusions, the ALJ specifically noted that Plaintiff also alleged

1 disability based on headaches. [AR 16 (“The claimant alleged disability based on back
2 impairment, right eye impairment, and headaches.”)]. However, the ALJ failed to categorize
3 Plaintiff’s headaches as a severe or non-severe impairment that affected his RFC, or otherwise
4 discuss the extent to which Plaintiff’s testimony regarding limitations from headaches was
5 supported by other evidence in the record. The ALJ’s written decision acknowledges that Plaintiff
6 “testified that he experienced severe headaches since being shot in the right eye” and that a
7 September 2012 treatment record contained Plaintiff’s complaints of “headaches since the June
8 2008 gunshot injury.” [AR 16-17]. However, the ALJ’s written decision does not analyze
9 whether the headaches were severe or non-severe impairments, and does not explicitly make a
10 finding on whether the headaches were medically determinable impairments (although the written
11 decision’s reference to the September 2012 treatment record would appear to imply that they are
12 medically determinable).

13 The record contains corroborated evidence regarding Plaintiff’s severe headaches during
14 the relevant time period. *See, e.g.*, AR 48 (testifying at the 10/2/12 hearing: “I have serious
15 headaches all the time frequently.”); AR 96 (“My headaches have worsened.”); AR 580
16 (complaining of “headaches” on a 12/14/10 Function Report); AR 835-37 (noting in a 9/7/12
17 treatment record Plaintiff’s complaints of persistent, daily headaches).

18 Despite Plaintiff’s arguments based on the headaches and the corroborated evidence
19 discussed above, the ALJ’s RFC formulation did not include any limitations from Plaintiff’s
20 headaches, and did not include any analysis or reasoned explanation as to why such limitations
21 were not included. The ALJ’s failure to address the headaches issue was of legal significance and
22 ultimately harmful to Plaintiff, because this failure to address the headaches affected the
23 hypothetical questions posed to the Vocational Expert. *See Hill v. Astrue*, 698 F.3d 1153, 1162
24 (9th Cir. 2012) (“If a vocational expert’s hypothetical does not reflect all the claimant’s limitations,
25 then the expert’s testimony has no evidentiary value to support a finding that the claimant can
26 perform jobs in the national economy.”).

27 Accordingly, in light of the record and in view of applicable legal standards, the Court
28 finds that remand on this issue is, therefore, required. *See Michaud v. Saul*, No. 18-CV-2625 JLS

(MDD), 2020 WL 114196, at *1-2 (S.D. Cal. Jan. 10, 2020); *Lord v. Colvin*, No. C13-1775-MJP, 2014 WL 4436924, at *7-8 (W.D. Wash. Sept. 8, 2014).

II. Sit/Stand Limitation

Plaintiff next argues that the ALJ’s finding regarding Plaintiff’s sitting and standing limitation is “conclusory” and “unsupported” by medical evidence or the overall record. [Dkt. 16 at 8]. Specifically, the ALJ’s written decision found that Plaintiff “requires the ability to alternate between sitting and standing periodically throughout the workday as needed . . . to ensure there is no exacerbation of back pain symptoms.” [AR 16].

It is not sufficient to show that an error exists in an RFC determination—a Plaintiff must also show that the error is harmful (or not harmless). “Generally, if the ALJ assesses a more restrictive RFC, even if the ALJ erred in the assessment, the error is harmless because the additional restriction is more favorable to the plaintiff.” *Clara Ann K. v. Saul*, No. 3:19-cv-01099-BEN-NLS, 2020 WL 5658720, at *14 (S.D. Cal. Sept. 22, 2020); *Brown-Hunter v. Colvin*, 806 F.3d 487, 492 (9th Cir. 2015) (“Even when the ALJ commits legal error, we uphold the decision where that error is harmless,” such as when “it is inconsequential to the ultimate nondisability determination.”). “Where harmfulness of the error is not apparent from the circumstances, the party seeking reversal must explain how the error caused harm.” *McLeod v. Astrue*, 640 F.3d 881, 887 (9th Cir. 2011).

The Court agrees that the ALJ’s sit/stand limitation is not artfully worded and also that there is insufficient explanation as to the reason for the limitation. However, Plaintiff offers no explanation as to why he believes the ALJ’s sit/stand finding was harmful. Even assuming the ALJ erred in giving Plaintiff a more restrictive sit/stand limitation, the ALJ’s more restrictive RFC reduced the number of potential jobs available in the national economy that Plaintiff could perform. A more restrictive RFC finding is, at least facially, favorable to Plaintiff. That is, a reduction in the number of potential jobs available (due to the sit/stand limitation) increases (and does not decrease, on this record) the strength of the argument and thus the likelihood of a finding that Plaintiff is disabled. Because the error complained of here was, if anything, not harmful to Plaintiff (and had the potential to be helpful to Plaintiff’s arguments), the alleged error (even if

taken to be error) proved “inconsequential to the ultimate nondisability determination.” *Leach v. Kijakazi*, 70 F.4th 1251, 1256 (9th Cir. 2023) (“[W]e conclude that the error was harmless because it was inconsequential to the ultimate nondisability determination.”). The record shows that, even when the ALJ used the more restrictive RFC with the complained of sit/stand limitation, the ALJ still did not render a favorable disability finding. Put another way, Plaintiff here has not shown how or why the ALJ could have reached a different disability finding had they used a less restrictive RFC finding which excluded the sit/stand limitation. In this situation and on this record, Plaintiff has not established why any error here ultimately harmed Plaintiff.

Accordingly, the Court finds no reversible error with respect to this issue because any error with regard to the sit/stand limitation was harmless.

III. Whether the ALJ Erred in Evaluating Plaintiff’s Subjective Allegations of Pain

Plaintiff next challenges the ALJ’s RFC findings, which are based on an evaluation of the Plaintiff’s subjective allegations regarding the intensity, persistence, and limiting effects of his medically determinable impairments and the pain resulting therefrom, including a credibility determination. [Dkt. 16 at 9-12].

“[S]ubstantial evidence does not support an ALJ’s RFC assessment if ‘the ALJ improperly rejected [the claimant’s] testimony as to the severity of his pain and symptoms.’” *Ferguson v. O’Malley*, 95 F.4th 1194, 1199 (9th Cir. 2023) (quoting *Lingenfelter v. Astrue*, 504 F.3d 1028, 1035 (9th Cir. 2007)). The Ninth Circuit has established a two-part analysis for determining the extent to which a claimant’s symptom testimony must be credited. *Trevizo v. Berryhill*, 871 F.3d 664, 678 (9th Cir. 2017). “First, the ALJ must determine whether the claimant has presented objective medical evidence of an underlying impairment which could reasonably be expected to produce the pain or other symptoms alleged.” *Ferguson*, 95 F.4th at 1199 (quoting *Garrison v. Colvin*, 759 F.3d 995, 1014 (9th Cir. 2014)). “If the claimant meets the first step of this analysis and there is no evidence of malingering, [then in the second step] the ALJ can reject the claimant’s testimony about the severity of their symptoms only by offering specific, clear and convincing reasons for doing so.” *Id.* (quoting *Garrison*, 759 F.3d at 1014-15) (alteration omitted).

The “clear and convincing” standard requires the ALJ to “specifically identify” which

portions of the claimant’s testimony the ALJ finds “not to be credible” and “explain what evidence undermines that testimony.” *Lambert v. Saul*, 980 F.3d 1266, 1277 (9th Cir. 2020) (quoting *Treichler*, 775 F.3d at 1102) (remaining citations omitted). “This is not an easy requirement to meet: ‘The clear and convincing standard is the most demanding required in Social Security cases.’” *Trevizo*, 871 F.3d at 678 (quoting *Garrison*, 759 F.3d at 1014-15).

The ALJ has the responsibility to determine “credibility, resolve[s] conflicts in the testimony, and resolve[s] ambiguities in the record.” *Lambert*, 980 F.3d at 1277 (quoting *Treichler*, 775 F.3d at 1098). The ALJ may not “reject a claimant’s subjective complaints based solely on a lack of medical evidence to fully corroborate the alleged severity of pain.” *Smartt*, 53 F.4th at 494 (quoting *Burch v. Barnhart*, 400 F.3d 676, 681 (9th Cir. 2005)). Nor may the ALJ “justify a credibility finding ‘by ignoring competent evidence in the record that suggests another result.’” *Diedrich v. Berryhill*, 874 F.3d 634, 643 (9th Cir. 2017) (quoting *Gallant v. Heckler*, 763 F.2d 1450, 1456 (9th Cir. 1984)).

Here, Plaintiff alleges disability from back impairment, visual impairment, and headaches. In the written decision, the ALJ found that Plaintiff’s impairments could reasonably have given rise to the severe pain and functional limitations to which Plaintiff testified that he suffers. [AR 17]. The ALJ’s decision thus relied on evaluating the credibility of Plaintiff’s testimony about pain. Under the Ninth Circuit’s analytical rubric, the ALJ was accordingly required to make the legally mandated subsidiary findings regarding Plaintiff’s own testimony, *i.e.*, specifically identify the testimony found not credible and explain what evidence supports that lack of credibility finding. Because the ALJ made no finding that Plaintiff was malingering, the ALJ was required to set forth specific, clear, and convincing reasons in support of the adverse credibility finding. *Garrison*, 759 F.3d at 1014-15.

In the written decision, the ALJ evaluated Plaintiff’s credibility regarding his statements about his symptoms and pain. The ALJ found that the Plaintiff’s testimony regarding the intensity, persistence, and limiting effects of his symptoms was “not entirely consistent with the medical evidence and other evidence in the record at all times relevant[.]” [AR 17]. Specifically, the ALJ provided the following justifications for not crediting Plaintiff’s testimony: (1) that

Plaintiff's testimony about symptoms was inconsistent with Plaintiff's own statements regarding his activities of daily living, including his testimony regarding his 2016-2018 employment as a warehouse worker; and (2) that Plaintiff's testimony regarding "significantly compromised standing/walking tolerance" was "inconsistent" with Dr. Pon's examination and findings. [AR 18].

Plaintiff's Activities of Daily Living Including His 2016-2018 Warehouse Job

Plaintiff argues that the ALJ's analysis of his subjective complaints was "incomplete and inaccurate," because the ALJ relied heavily on the fact that Plaintiff "testified he was able to work from 2016 to 2018 in a warehouse as a void filler, package filler, and crate stacker[,] . . . [and] reported no problems walking or standing while working and he was able to successfully work at a much higher exertional level than that called for in the [RFC] assessed herein." [Dkt. 16 at 9 (citing AR 18)]. Plaintiff argues that the ALJ mischaracterized his testimony and omitted the fact that he "did report a number of problems trying to perform" this work. *Id.* at 10. In addition, Plaintiff argues that his earnings from the warehouse job were, in fact, "quite minimal." *Id.*

The ALJ's description of Plaintiff's 2016-2018 warehouse work either ignores, rejects as not credible without explanation, or mischaracterizes aspects of Plaintiff's testimony regarding difficulties performing the work. *See Garrison*, 759 F.3d at 1016 (finding ALJ's selective presentation of the claimant's reported daily activities erroneous, where the ALJ failed to note that the claimant had to rest between activities, needed help to do the activities, and could not always complete the activities given her pain); *A.P. v. Kijakazi*, No. 23-cv-01184-EMC, 2024 WL 116307, at *10 (N.D. Cal. Jan. 10, 2024) ("The ALJ cannot mischaracterize statements and documents in the record or take these out of context in order to reach [her] conclusion on the claimant's credibility.").

Specifically, Plaintiff testified that he had difficulty standing; that he required numerous breaks; and that he often would have to leave work early. [AR 1158]. The ALJ's written decision did not discuss these limitations on Plaintiff's ability to work the warehouse job, much less provide clear, specific reasons for discounting them. *See Revels v. Berryhill*, 874 F.3d 648, 668 (9th Cir. 2017) (holding that the ALJ erred by not providing "clear and convincing" evidence to

discredit the claimant on the basis of activities of daily living). Based on the written decision, it is unclear why the ALJ ignored this testimony, but it is clear that the ALJ did not set forth the legally required analysis to demonstrate by clear and convincing evidence why the ALJ found this testimony not credible.

Accordingly, the Court finds that remand on this issue is appropriate.

Dr. Pon's Opinion

Plaintiff also argues that the ALJ improperly discounted Plaintiff's subjective allegations based on Dr. Pon's consultative examination report. [Dkt. 16 at 11]. Specifically, Plaintiff takes issue with the following sentences in the ALJ's written decision: "The claimant's reports of significantly compromised standing/walking tolerance are inconsistent with the progress notes and Dr. Pon's examination, showing little to no strength deficits affecting the lower extremities. The examinations do not any [sic] level of muscle atrophy or diminished muscle tone that would suggest such limited standing or walking." *Id.* (quoting AR 18). Plaintiff does not argue that the ALJ improperly evaluated Dr. Pon's opinion itself. Rather, Plaintiff argues that the ALJ's reliance on the opinion to discount Plaintiff's testimony was improper because (1) the ALJ provided "no specific opinion or medial [sic] reason for why muscle atrophy or strength deficits or diminished muscle tone are required to support allegations of pain and limitations with standing or walking;" and (2) it is "not clear that Dr. Pon was fully aware of the severity of [Plaintiff]'s lumbar spine or the actual surgeries performed." *Id.*

The Court finds no error in the ALJ's reliance of Dr. Pon's opinion to discount Plaintiff's symptoms testimony. The ALJ articulated clear, specific reasons for the finding to the extent relied upon by Dr. Pons's opinion. The fact that Plaintiff would have weighed this evidence differently is irrelevant. *See Smartt*, 53 F.4th at 494 ("Where evidence is susceptible to more than one rational interpretation, the ALJ's decision must be affirmed.").

Dr. Lewis's Opinion

Plaintiff also argues that the ALJ improperly and unfairly concluded that Dr. Lewis's opinion regarding her 2022 one-time examination of Plaintiff was "not relevant" because it was based on findings outside of the relevant time period, yet "offered no explanation for why the

1 work activity in 2016-2018 was somehow relevant to the determination for disability for the
 2 relevant period.” [Dkt. 16 at 11-12]. As with Dr. Pon’s opinion, Plaintiff does not argue that the
 3 ALJ improperly evaluated the substance of Dr. Lewis’s opinion. Rather, quoting from *Taylor v.*
 4 *Commissioner of Social Security Administration*, 659 F.3d 1228 (9th Cir. 2011), Plaintiff argues
 5 that “[m]edical evaluations after the relevant time period . . . are relevant if they concern the
 6 claimant’s conditions during that period.” *Id.* at 12.

7 Plaintiff’s reliance on *Taylor* is not persuasive because that case is distinguishable from the
 8 situation here. In *Taylor*, the Ninth Circuit found that the Appeals Council had improperly failed
 9 to consider an evaluation and medical source statement that post-dated the ALJ’s decision. 659
 10 F.3d at 1233. The doctor who created those records, however, had examined the claimant twice
 11 during a five-year period prior to the expiration of his insured status, had supervised the nurse
 12 practitioner who treated the claimant, and had approved the prescription of the claimant’s
 13 medications. *Id.* at 1232. The Commissioner in *Taylor* did not dispute that the doctor’s opinion
 14 concerned the claimant’s impairments and limitations *during the period before his insured status*
 15 *expired*. *Id.* Further, the Appeals Council in *Taylor* denied review without addressing the
 16 doctor’s opinion at all. *Id.* at 1232-33.

17 Here, Plaintiff does not argue—and nor does the record show—that Dr. Lewis treated or
 18 evaluated Plaintiff prior to the November 2012 ALJ decision date. Dr. Lewis’s opinion itself
 19 explicitly states that it concerns, as of June 2022, “current limitations only.” [AR 1124]. Dr.
 20 Lewis did not provide *any* opinions concerning past limitations. The doctor’s opinion in *Taylor*
 21 was based on examinations during the relevant period, concerning impairments during the relevant
 22 period. 659 F.3d at 1232. Unlike *Taylor*, Dr. Lewis’s opinion here is solely based on an
 23 examination performed after the relevant time period, concerning impairment outside the relevant
 24 time period.

25 The Court finds no error in the ALJ’s discounting of Dr. Lewis’s opinion as not relevant
 26 for the purposes Plaintiff relies upon. The case law cited by Plaintiff is inapposite. Accordingly,
 27 the Court finds that Plaintiff has failed to show error based on Dr. Lewis’s opinion which would
 28 justify reversal or require a remand. *Cf. Smith v. Berryhill*, No. 16-cv-03934-SI, 2017 WL

993072, at *12-13 (N.D. Cal. Mar. 15, 2017) (finding no error in Appeal Council’s refusal to remand the case for consideration of similar evidence that fell outside of the relevant time period).

IV. Further Asserted Grounds for Reversal

Plaintiff raises additional arguments regarding the sufficiency of the ALJ’s step five analysis. [Dkt. 16 at 12-16]. Because remand is warranted based on the ALJ’s failure to adequately assess Plaintiff’s RFC, there is no need to address these other arguments at this time. *See Marcia v. Sullivan*, 900 F.2d 172, 177 n.6 (9th Cir. 1990) (“Because we remand for reconsideration of step three, we do not reach the other arguments raised.”). Having already ordered a remand (which will result in a record different from the current record under consideration), it makes little practical sense to devote the Parties’ and the Court’s resources to whether or not there are even more reasons for that same remand.

The Court expresses no opinion as to the merits of Plaintiff’s other arguments not specifically addressed herein. Neither Party should construe the Court’s restraint based on the Court’s authority (including notions of judicial economy and practicality) as tacit approval, or disapproval, of how the evidence was considered. This Order should not be read to suggest the result that should be reached on remand, nor should the proceedings in this Court leading to this Order (or the Order itself) be considered or construed as a waiver of any arguments. Rather, upon remand, the Parties and the ALJ are directed to fully consider the evidence and all issues in dispute, based on the more fulsome record ordered.

V. Whether to Remand for An Award of Benefits

When a court reverses an ALJ’s decision, “the proper course, except in rare circumstances, is to remand to the agency for additional investigation or explanation.” *Dominguez v. Colvin*, 808 F.3d 403, 407 (9th Cir. 2015) (quoting *Treichler*, 775 F.3d at 1099). Here, Plaintiff requests that the Court remand the case for the payment of benefits, or alternatively, for further proceedings. [Dkt. 16 at 18-19].

A remand for an award of benefits is proper, however, where (1) the ALJ has failed to provide legally sufficient reasons for rejecting evidence, whether claimant testimony or medical opinion; (2) the record has been fully developed and further administrative proceedings would

1 serve no useful purpose; and (3) if the improperly discredited evidence were credited as true, the
 2 ALJ would be required to find the claimant disabled on remand. *Garrison v. Colvin*, 759 F.3d
 3 995, 1020 (9th Cir. 2014) (quotation marks omitted). Even if all three requirements are satisfied,
 4 the Court retains flexibility to determine the appropriate remedy. *Id.* at 1020-21.

5 The first factor for remanding for an award of benefits is met because the ALJ failed to
 6 provide sufficient legal reasons for discrediting Plaintiff's symptoms testimony. The second
 7 factor for a remand for an award of benefits is not met, however, because further proceedings are
 8 necessary so that all of the medical evidence that is entitled to credit, and all of Plaintiff's
 9 impairments, may be considered in formulating an appropriate RFC. It is unclear whether the
 10 third factor is met, because it is unclear on this record what would be an appropriate RFC (after
 11 considering all of the evidence and issues that the ALJ's written decision omitted, as discussed
 12 above) and thus unclear whether there are jobs in the economy for an individual with Plaintiff's
 13 as-yet-unformulated RFC. Because the factors for a remand for an award of benefits are not
 14 satisfied here, the Court will instead remand for further proceedings.

15 Accordingly, the Court finds that remand for further proceedings is the appropriate course
 16 of action here.

17 CONCLUSION

18 For the foregoing reasons, **IT IS ORDERED THAT:**

- 19 1. The Commissioner's final decision in this matter is **REVERSED** and this case is
 20 **REMANDED** to the Commissioner for further administrative proceedings consistent with
 21 this Order.
- 22 2. Plaintiff is awarded costs pursuant to Federal Rule of Civil Procedure 54(d)(1).

23
 24 **IT IS SO ORDERED.**

25 Dated: March 31, 2025

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 27 

PETER H. KANG
 United States Magistrate Judge